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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 715.

THE ARKANSAS CORPORATION COMMISSION and FIFTY-ONE COUNTY TAX COLLECTORS OF ARKANSAS,
Petitioners,

vs.

GUY A. THOMPSON, as Trustee of MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Respondent.

BRIEF OF RESPONDENT.

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vs.

GUY A. THOMPSON, as Trustee of MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Respondent.

BRIEF OF RESPONDENT.

STATEMENT.

This controversy originates with a petition filed by Guy A. Thompson, Trustee for the Missouri Pacific Railroad Company, in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to hear and determine the amount and legality of certain taxes, in the fifty-one counties in the State of Arkansas, based upon an assessment of the Trustee's railroad properties in that State for the year 1939.

The Trustee filed this petition in reliance upon the mandate of Section 64 of the Federal Bankruptcy Act, as

amended on June 22, 1938 (52 Stat. at page 874) that "in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the Court."

The petition (R. 4-16) sets forth, with some particularity, the nature of "the question" as to the taxes in dispute. The attack upon the assessment made by the Arkansas Corporation Commission is predicated primarily upon the provision of the Arkansas statutes (Section 2044, Pope's Digest), which is copied in full in appendix to petitioners' brief, that all property to be assessed by the Commission shall be upon the basis of the fair market value thereof, or, to quote the statute literally, "upon the consideration of what a clear fee-simple title thereto would sell for under conditions under which that character of property is usually sold."

The petition alleges, in paragraph 13 (b) (R. 15), that this provision of the Arkansas statute has been violated in that the Trustee's property in Arkansas has been assessed for the year in question (1939), and for many years prior thereto, at more than its full and actual value.

The petition further alleges that this assessment of the Trustee's property at much more than its full and actual value was likewise in violation of Section 5 of Article XVI of the Constitution of Arkansas, which provides that all property shall be taxed according to its value and that no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, and that all values shall be ascertained so as to make same equal and uniform throughout the State—and also, because imposing upon the Trustee a wholly disproportionate share of the tax burden, in violation of the Fourteenth Amendment to the Constitution of the United States.

Reverting for a moment to the allegations of over-

assessment, in violation of the Arkansas statutes and Constitution, it will be observed that the Arkansas statute (Section 2048 of Pope's Digest), which is fully set forth in appendix hereto, provides for the assessment of the property of an interstate railroad, or other utility, operating in part within that state, upon a unit basis—that is to say, first assigning a value to the entire railroad system and then determining the part thereof which should properly be assigned to Arkansas. It is also averred, in paragraph 8 of the petition (R. 9) that other property in Arkansas is assessed at a maximum of 40 per cent of the full value thereof, and it is but fair to the petitioners herein to state that no controversy exists with respect to either the allocation factor or the equalization factor used by the Arkansas Commission in arriving at the assessment under review. As is averred in paragraph 8 of the petition (R. 9) the assessment for 1939, in the sum of $28,050,000, was almost exactly the same as the assessment for 1938, which was $28,114,960. Extensive evidence, both by the State and by the Trustee, has already been presented in the controversy involving the 1938 assessment, in which case the order of the District Court overruling the State's motion to dismiss, is reported in **33 Fed. Supp. 728**, to which reference is made at page 12 of petitioners' brief. In that case the allocation factor of 28.39411 per cent, representing the Arkansas proportion of the System property, and the equalization factor of 40 per cent, were both stipulated as proper.

In other words, the entire controversy as to the assessment hinges upon the **System Value** of a railroad operating in eight different states. Petitioners are quite correct in the statement on page 4 of their brief, that it is only the System value, as found by the Arkansas Commission, which is assailed.

It is this entire railroad system which is involved in the

reorganization proceeding, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, under the provisions of Section 77 of the amended Brankruptcy Act.

The Trustee's petition further avers the manner in which the railroad system was grossly over-valued by the Arkansas Corporation Commission—in that [paragraphs 8 and 13 (a)] predominant weight was assigned to original cost and to cost of reproduction, and wholly inadequate consideration given to the market value of the railroad's stocks and bonds and to an enormous reduction in earnings occasioned by general business considerations and to rapid increase of competition from buses, trucks, water and air.

The factors of original cost and cost of reproduction, to which the Commission assigned predominant weight in arriving at the true market value of the railroad system, have been uniformly and consistently condemned as unreliable determinants of true market value, in numerous decisions of this Court and of the United States Circuit Courts of Appeals, to which reference will be made in argument.

Attention should be directed to an incomplete and misleading reference to section 2044 of the Arkansas statutes, which appears at page 3 of petitioners' brief. It is there stated that this section "requires the Commission to consider the estimated investment and valuation of the property as set up in the Company's books as the basis for adjustment of rates or charges for service * * *."

Section 2044 is correctly set forth in appendix to petitioners' brief, at page 44 thereof, and it will be observed that the statute actually provides that "as evidence tending to show what this" (true market value) "would be, the Commission, **in so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so,** shall ascertain as nearly as it can

and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain."

The Trustee's petition avers that the Arkansas Corporation Commission were fully advised of the facts which rendered original cost or cost of reproduction of the properties determinants of true market value of the railroad property at this time, and further avers that a value of the railroad system based upon market value of stocks and bonds and earnings (which are the first two determinants specified in the Arkansas statute) would result in an assessment not exceeding the sum of $16,830,000, or $11,220,000 less than the assessment made by the Arkansas Commission for the year in question.

The petition alleges, in paragraph 5 (R. 6-7), full compliance with all the administrative steps required by the Arkansas statute.

On page 5 of their brief, petitioners say that the Trustee fails to allege compliance with the remedy through appeal to the courts of Arkansas, for which provision is made in sections 2019-2020 of the Arkansas statutes, and which, petitioners say, at page 15 of brief, has been held by the Supreme Court of Arkansas "to be a judicial review of the action of the administrative body."

It is quite true that the Trustee did not appeal to the Arkansas courts. Following the decisions by the United States Circuit Court of Appeals in the two St. Francis Levee District Cases (to which reference will be made in argument), and the denial by this Court of certiorari in each of those cases, the Trustee acted upon the assumption that, under the provisions of Section 64 of the Bank-

ruptcy Act, the Bankruptcy Court in which the reorganization proceeding was pending, i. e., the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, was the proper tribunal, and the **only** proper tribunal to hear and determine the proper amount and validity of the disputed tax. And in reliance upon this assumption, which we submit was wholly warranted, the Trustee, on April 11, 1940, before the first installment of the taxes based upon the 1939 assessment fell due, filed his petition in that court, praying authority to tender payment of the sum of $620,645, which he conceded to be due for that year, based upon a proper assessment, and asking the Court to promptly hear and determine the controversy as to the balance, amounting to $416,043.17.

It should be pointed out that if the petitioners' motion to dismiss the Trustee's petition is sustained, the petitioners will escape **any** judicial review of the very enormous over-assessment which the Trustee alleges to have been made by the Arkansas Corporation Commission, because the thirty-day period following the entry on the record of the Arkansas Corporation Commission for its order, within which appeal might be prosecuted to the Circuit Court of Pulaski County, under the provisions of section 2019 of the Arkansas statute, which is set forth in appendix to petitioners' brief, at page 44 thereof, has, of course, now long since expired.

Following the filing of the Trustee's petition, and before any final order was made in connection therewith, petitioners, on July 5, 1940, filed in said District Court their motion to dismiss (R. 21-29). This motion was overruled by the District Court, with an opinion (R. 29-34), and appeal from the order of that court was prosecuted by petitioners to the United States Circuit Court of Appeals for the Eighth Circuit, by which the interlocutory order of the District Court was affirmed, 116 Fed. (2nd) 179.

POINTS TO BE ARGUED AND AUTHORITIES.

1. The decisions of the United States Circuit Court of Appeals for the Eighth Circuit in the St. Francis Levee District cases were correct and were properly followed by the District Court in the present case.

Authorities.

St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118 (Certiorari denied, 302 U. S. 750);
St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394 (Certiorari denied, 305 U. S. 647);
St. Francis Levee District v. St. Louis-San Francisco Ry. Co., 74 Fed. (2nd) 183;
Ex Parte Baldwin, 291 U. S. 610;
Henderson County, N. C., v. Wilkins, 43 Fed. (2nd) 670;
In re Gustav Schaefer, 103 Fed. (2nd) 237;
Continental Illinois National Bank & Trust Co., 294 U. S. 648.

2. The powers of the Bankruptcy Court were not exceeded.

Authorities.

In re Wood & Henderson, 210 U. S. 246;
U. S. F. & G. Co. v. Bray, 225 U. S. 205;
Van Huffel v. Harkelrode, 284 U. S. 225;
New York v. Irving Trust Co., 288 U. S. 329;
New Jersey v. Anderson, 203 U. S. 483;
Kalb v. Feuerstein, 308 U. S. 433;
Section 64a of Bankruptcy Act;
Section 77 of Bankruptcy Act.

3. The provision of Section 64 of the Bankruptcy Act "that in case any question arises as to the amount of legality of any taxes, such question shall be heard and determined by the Court" is not inconsistent with section

77 of the act, and is of governing force in proceedings under section 77.

Authorities.

Section 64a of Bankruptcy Act;
Section 77 (1) of Bankruptcy Act;
Chap. 10, Section 102, of Bankruptcy Act;
Michigan v. Michigan Trust Co., 286 U. S. 334;
In re Denver & Rio Grande Western R. R. Co., 23 Fed. Supp. 298;
St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118;
St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394.

4. The jurisdiction to hear and determine any question as to taxes, under the provisions of Section 64a of the Bankruptcy Act, extends to taxes accruing during the Trustee's possession of the property.

Authorities.

Henderson County, N. C., v. Wilkins, 43 Fed. (2nd) 670;
Dickinson v. Riley, 86 Fed. (2nd) 385;
In re Denver & Rio Grande Western R. R. Co., 23 Fed. Supp. 298;
St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118;
St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394.

5. The preliminary order of the District Court, entered on April 11, 1940, was not an injunction, and, a fortiori, it was not in violation of Section 24 of the Judicial Code.

Authorities.

Section 24 of the Judicial Code (50 Stat. 738);
Ex Parte Baldwin, 291 U. S. 610;

Henderson County, N. C., v. Wilkins, 43 Fed. (2nd) 670;
St. Francis Levee District v. Kurn, 91 Fed. (2nd) 118;
St. Francis Levee District v. Kurn, 98 Fed. (2nd) 394.

6. Even though the Arkansas statutes may provide for a judicial review in the state's courts of the assessments made by the Corporation Commission, this does not deprive the Bankruptcy Court of the jurisdiction to hear and determine the amount or legality of any tax as to which any question may arise.

Authorities.

U. S. F. & G. Co. v. Bray, 225 U. S. 205;
Kalb v. Feuerstein, 308 U. S. 433.

7. The issue presented in Trustee's petition is clearly justiciable.

Authorities.

Constitution of Arkansas, Article XVI, Section 5;
Section 2044, Statutes of Arkansas;
Section 2048, Statutes of Arkansas;
Dawson v. Kentucky Distilleries, 255 U. S. 288;
New Jersey v. Anderson, 203 U. S. 483;
In re Gustav Schaefer Co., 103 Fed. (2nd) 237;
Great Northern Ry. Co. v. Weeks, 297 U. S. 135;
Chicago & Northwestern Ry. v. Eveland, 13 Fed. (2nd) 442;
Bailey v. Megan, 102 Fed. (2nd) 651;
Standard Oil Co. v. Southern Pacific Co., 268 U. S. 146;
A. B. & C. R. R. Co. v. United States, 296 U. S. 33;
Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658;
Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U. S. 188.

ARGUMENT.

We will in this argument follow, in all respects, the order of presentation set forth in petitioners' brief.

1. The St. Francis Levee District Cases.

At the outset of their brief, petitioners seek to escape the effect of the two St. Francis Levee District cases—*Board of Directors St. Francis Levee District v. Kurn*, 91 Fed. (2nd) 118, in which certiorari was denied by this Court on November 22, 1937 (302 U. S. 750), and *Board of Directors of St. Francis Levee District v. Kurn*, 98 Fed. (2nd) 394, in which certiorari was denied by this Court on November 14, 1938 (305 U. S. 647).

The suggestion, on page 11 of petitioners' brief, that the assessments made by the St. Francis Levee District were not to be regarded as taxes, on the same basis as "taxes imposed by the State or its political subdivisions," because the Supreme Court of Arkansas has, as is pointed out by the Court of Appeals in the last St. Francis Levee District case (98 Fed. [2nd], at page 397), held such levee districts to be "quasi-public corporations, like railroads," is fallacious. This will clearly appear from a brief review of the litigation involving those levee assessments, as revealed in the cases thus far decided. In a prior suit involving assessments for other years made by this same levee district, the Court of Appeals for the Eighth Circuit reversed a decree of the United States District Court for the Eastern District of Arkansas which had enjoined the enforcement of said assessments in response to a suit filed by the St. Louis-San Francisco Railway Company prior to its adjudication as a debtor under Section 77 of the Bankruptcy Act. The opinion of the Court of Appeals in that case—Board of Directors of St. Francis Levee District v.

St. Louis-San Francisco Ry. Co., 74 Fed. (2nd) 183, quotes at length the Arkansas statutes authorizing the creation of such levee districts and the assessment of taxes upon property within the district. And the Court of Appeals, in the opinion last cited, reversed the decree of the District Court and directed that the bills for injunction be dismissed because the railway company had failed to exhaust its administrative remedies before the Levee Board created pursuant to the statutes of the state.

In the statutes of Arkansas authorizing these levee district assessments, they are referred to as "taxes." They are similarly designated throughout the three opinions of the Circuit Court of Appeals—74 Fed. (2nd) 183, 81 Fed. (2nd) 118, and 98 Fed. (2nd) 394, and they conform in all respects to the definition of "taxes" as approved by this Court in *New Jersey v. Anderson*, 203 U. S. 483, at page 492, i. e., "* * * imposts levied for the support of the Government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement."

It will be observed that the decisions in all three St. Francis Levee District cases were rendered by the same court—the Court of Appeals for the Eighth Circuit. When the two latter cases, reported in 91 Fed. (2nd) 118 and 98 Fed. (2nd) 394, came before that Court the railway company was in reorganization and the Court was dealing with these facts:

(a) Claims for taxes assessed by a board created pursuant to state statute,

(b) asserted against a railroad in reorganization under Section 77 of the Bankruptcy Act, and

(c) accruing subsequent to the adjudication of the railway company as a debtor and the taking over of its properties by the trustee appointed by the Court,

and the Court held that under these conditions questions as to the amount and validity of the tax claims should be submitted to the Bankruptcy Court and settled by it.

The only essential particular in which the facts presented in the St. Francis Levee District cases differ from those in the case at bar is that in those cases there was undoubtedly presented an injunction against the further prosecution of suits which had been filed, by the board of directors for the Levee District, in the state courts, whereas in the case at bar there is no injunction at all, but simply a call upon the taxing authorities to appear in the Bankruptcy Court in connection with a hearing by that Court as to the amount and legality of the disputed assessment. Elsewhere in their argument (at pages 31-33 of their brief) counsel for petitioners contend that the order entered by the District Court on April 11, 1940 (R. 17-21) was an injunction. An examination of the order will, we submit, show most clearly that it was not an injunction and that the District Court (R. 30) and the Court of Appeals (R. 40) were correct in so holding. However, if petitioners are correct in their contention that the order in the present case was an injunction, then there is an absolute parallel between the present case and the last St. Francis Levee District case, 98 Fed. (2nd) 394, in which the Court held that the Bankruptcy Court was not in violation of the provisions of the Act of August 21, 1937 (Section 24 of the Judicial Code as amended), in restraining the enforcement, by the state courts, of liens upon property within the exclusive jurisdiction of the Bankruptcy Court. And this holding of the Court of Appeals is directly in line with the rule laid down by this Court in an opinion by Mr. Justice Brandeis, in *Ex Parte Baldwin*, 291 U. S. 610, at page 615, as follows:

"All property in possession of a bankrupt of which

he claims the ownership passes, upon the filing of a petition in bankrutcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference that Court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that where a court of competent jurisdiction has, through its officers, taken property into its possession the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same. Julian v. Central Trust Co., 193 U. S. 93, 112, 48 L. Ed. 629, 639, 24 S. Ct. 399; compare Riehle v. Margolies, 279 U. S. 218, 223, 73 L. Ed. 669, 283 U. S. 319, 75 L. Ed. 1074, 51 S. Ct. 465. The jurisdiction in such cases is exclusive of the jurisdiction of other courts, although otherwise the controversy would be cognizable in them. Murphy v. John Hofman Co., 211 U. S. 562, 569, 52 L. Ed. 327, 330, 29 S. Ct. 154, 21 Am. Bankr. Rep. 487. In bankruptcy, this rule applies regardless of whether the property is located in the district in which the bankruptcy proceeding originated."

The cases cited at page 12 of petitioners' brief, viz., Palmer v. Massachusetts, 308 U. S. 79; Railroad Commission v. Rowan & Nichols Oil Company, 310 U. S. 573, and Nashville, Chattanooga & St. Louis Railway v. Browning, 310 U. S. 362, have no bearing whatever upon the propositions passed on in the St. Francis Levee District cases. In Palmer v. Massachusetts this Court affirmed the decree of the United States Circuit Court of Appeals for the Second Circuit, in Converse v. Commonwealth of Massachusetts, 101 Fed. (2nd) 48, which, in turn, had reversed a decree of its District Court of the United States for the District of Connecticut directing the trustees of the Old Colony Railroad and the New York, New Haven & Hartford Railroad (in reorganization under Section 77) to dis-

continue passenger service at some eighty-eight stations in Massachusetts and five stations in Rhode Island. The Court of Appeals held that the Bankruptcy Court was without authority, under the provisions of section 77, to make such an order, pending an investigation which was then being made by the Department of Public Utilities of Massachusetts, and this Court affirmed the decree of the Court of Appeals, saying (310 U. S., at page 83):

> "Plainly enough the District Court had no power to deal with a matter in the keeping of the State authorities unless Congress gave it."

It is perfectly manifest that this decision affords no reason for overturning the holding of the Court of Appeals in the St. Francis Levee District cases that, by reason of the express mandate of Section 64 of the Bankruptcy Act, the Bankruptcy Court was vested with exclusive jurisdiction to finally hear and determine any question as to the amount and legality of any taxes—the more especially when the Court of Appeals expressly recognized the rule which has consistently been followed in the determination by bankruptcy courts of disputed tax claims, that the question should be determined in accordance with the law of the State, 98 Fed. (2nd), at page 397. See, also, *Henderson County v. Wilkins,* 43 Fed. (2nd) 670, at page 672, wherein it was said:

> "Its" (i. e., the Bankruptcy Court's) "action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid on the claim for taxes from the assets of the estate in its possession."

And again, *In re Gustav Schaefer Co.,* 103 Fed. (2nd) 237, at page 241:

> "The language of the statute is plain that it is the

duty of the court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to the local taxing statute.''

There is nothing whatever in the decisions of the Court of Appeals in the two St. Francis Levee District cases, or in the petition filed by the Trustee in the present case, in reliance upon those decisions, which is in any respect inconsistent with the rule laid down by this Court in Palmer v. Massachusetts.

Equally unrelated to the holdings of the Court of Appeals in the St. Francis Levee cases are the two other cases cited by counsel for petitioners at page 12 of their brief, i. e., Railroad Commission v. Rowan & Nichols Oil Company, 310 U. S. 573, and Nashville, Chattanooga & St. Louis Railway v. Browning, 310 U. S. 362.

Neither of those cases involved a bankruptcy proceeding at all. In the Rowan & Nichols Oil Company case this Court reversed a decree of the District Court of the United States for the Western District of Texas, enjoining the Railroad Commission of Texas from carrying into effect a plan for prorating the production of petroleum in the East Texas field. The injunction against the order was based upon the claim that it was in violation of the Fourteenth Amendment. There were presented conflicting theories of proration, each of which was hotly defended. Under such circumstances this Court held that the judgment of the Court should not be substituted for the plan adopted by the administrative agency which had been vested by law with the responsibility of formulating and enforcing rules for proration.

However, it will scarcely be seriously contended that this decision exempts from judicial review an assessment

made by a state board which, it is charged, is in violation of the mandate of the state statute that all property shall be assessed upon the basis of its true market value. And when such allegedly illegal assessment is made upon property in the custody of the Bankruptcy Court, that court is vested with exclusive jurisdiction to hear and determine the question.

So also, in the case of N. C. & St. L. Ry. v. Browning, there was presented solely the question whether a tax assessment, which this Court held not to be discriminatory, was in violation of the Fourteenth Amendment solely because alleged to be excessive. That case came before this Court on writ of certiorari to the Supreme Court of Tennessee, which had held that the assessment in question was not in violation of the Constitution or statutes of that state. This Court was, of course, bound by the holding of the Supreme Court of Tennessee upon those points, and the only question before this Court was the alleged violation of the Fourteenth Amendment.

This Browning decision, most certainly, is no authority for denying to the Bankruptcy Court jurisdiction to hear and determine the validity of an assessment for taxation upon property which is in the custody of that Court, which assessment, it is alleged, is in violation of the statutes and of the Constitution of the state, as well as in violation of the Fourteenth Amendment because discriminatory with respect to other taxpayers generally, and imposing upon the Trustee's property a wholly disproportionate share of the tax burden.

Counsel for petitioners next refer to the decision of the Court of Appeals for the Eighth Circuit in *Thompson v. Terminal Shares,* 104 Fed. (2nd) 1, and say, at page 12 of their brief, that the decisions in the St. Francis Levee District cases "were in effect overruled" by that decision.

Later in their brief, on page 14, counsel for petitioners say: "This case is almost identical with the Terminal Shares case."

A most cursory examination of the opinion in the Terminal Shares case will show the radical and essential difference between the relief sought therein as contrasted with the questions presented in the two St. Francis Levee District cases or in the case at bar. In the Terminal Shares case the trustee was seeking to recover a large sum of money claimed by reason of certain executory contracts entered into by the debtor, prior to its adjudication. The money so sought to be recovered was in the possession of defendants located outside the jurisdiction of the Bankruptcy Court. It was not and never had been in the possession of the trustee. Upon motion of the defendants, the Bankruptcy Court (the United States District Court for the Eastern District of Missouri) entered an order vacating service of process and setting aside the order authorizing such service, which had previously been made in an ancillary and dependent suit filed by the trustee in that court. This action by the Bankruptcy Court was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, which discusses quite fully the extent to which Section 23b of the Bankruptcy Act is to be applied in proceedings under section 77, and concludes as follows:

> "We think that the jurisdiction conferred by Section 77 upon the courts of bankruptcy is not to be regarded as general, plenary, nation-wide jurisdiction at law and in equity over all questions incident to the collection of the claims of the debtor against third persons, but is to be considered as the traditional jurisdiction of such courts over the property of a bankrupt, wherever located, freed, however, from those limitations which made ancillary proceedings in other districts necessary, and with the powers which federal

equity courts exercise in receivership proceedings, so far as those powers may be necessary or appropriate in order to preserve and safeguard the property in the actual or constructive possession of debtors and in order to carry on their business pending reorganization."

The excerpt from the opinion in the Terminal Shares case very clearly points out the distinction between the two classes of cases. In determining the amount and legality of tax claims, which would constitute a lien upon property under its control, the Bankruptcy Court may summon claimants who are located outside its jurisdiction. It is, of course, apparent that these claimants should be notified, so that they may appear and present their claims. This was done, in the St. Francis Levee District cases, as to the board of directors of the Levee District, and in the case at bar as to the members of the Arkansas Corporation Commission, the Attorney-General for the state and the collectors for the fifty-one counties. Such issuance of process in support of the jurisdiction conferred upon the Bankruptcy Court by the act, and where necessary to effectuate the purposes of the law, is authorized by paragraph (a) of Section 77 of the Bankruptcy Act, and has been specifically approved by this Court in several cases. Thus, in *Continental Illinois National Bank & Trust Company v. C. R. I. & P. Ry. Co.*, 294 U. S. 648, at page 683, it is said:

"Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a single state, but in numerous instances reach into many districts and many states * * *. Jurisdiction over reorganization proceedings, however extensive the railway lines may be, is conferred upon a single district court. The usefulness of the section would be greatly minimized and in some instances destroyed if that court were powerless to send its process into any

state when necessary to effectuate the purposes of the law."

To the same effect is the decision of this Court in *Ex Parte Baldwin*, 291 U. S. 610, cited supra.

The decision of the Circuit Court of Appeals for the Third Circuit in Central Railroad Company of New Jersey v. Martin, 115 Fed. (2nd) 968, cited at page 15 of petitioners' brief, is not in point at all. No act of a bankruptcy court and no provision of the Bankruptcy Act was involved in that case, which was a consolidation of injunction suits brought by a number of railroad companies against certain officers of the State of New Jersey seeking to restrain the enforcement of tax assessments for the years 1934, 1935 and 1936 upon the ground that said assessments were in violation of the Fourteenth Amendment.

Any tax assessment necessarily involves officers of the state or taxing unit and if, in a hearing to determine the amount or legality of a disputed tax imposed under purported authority of the state, the Bankruptcy Court is precluded from giving due notice to the proper state officials, then Section 64 of the Bankruptcy Act is deprived of any meaning whatever. It would certainly be a travesty upon justice for the Bankruptcy Court to enter upon such a hearing without giving the state officials due notice thereof and affording them every opportunity to appear and justify the assessment if they can. No finding by a bankruptcy court that an assessment for state taxes was excessive or illegal, without such preliminary notice to the proper state officials, would be affirmed on appeal. The giving of such a notice, in connection with a hearing by the Bankruptcy Court under the provisions of section 64 of the act, is in no proper sense a suit against the state.

2. Powers of Bankruptcy Court Were Not Exceeded.

Under this head of their argument, at pages 15-20 of their brief, counsel for petitioners present a somewhat detailed analysis of the decision of this Court in Palmer v. Massachusetts, 308 U. S. 79. We have already discussed that decision, in connection with a previous reference thereto at page 12 of petitioners' brief. We do not at all question the fact that the Arkansas Corporation Commission is a "statutory State Board of equal state dignity as the Department of Public Utilities of Massachusetts," but we still say that the decision in Palmer v. Massachusetts has no controlling force in the present controversy. The decision in that case was based upon the view entertained by a majority of the Circuit Court of Appeals for the Second Circuit, affirmed by this Court, that Section 77 of the Bankruptcy Act conferred no authority upon the Bankruptcy Court to authorize the abandonment of local passenger facilities without the consent of the state authorities having jurisdiction in such matters. It will be noted that paragraph (o) of section 77 only authorizes the abandonment of carrier facilities "with the approval and authorization of the (Interstate Commerce) Commission when required by the Interstate Commerce Act," and the Court of Appeals construed this section as limiting the jurisdiction of the Bankruptcy Court, in an order of abandonment, to the concurrent control of the state regulatory body in matters pertaining to the furnishing of carrier facilities over which the State Board has jurisdiction.

However, there is no question raised in the decision in Palmer v. Massachusetts as to the jurisdiction of the Bankruptcy Court in any matter where jurisdiction is unquestionably conferred by the Act of Congress—and it can scarcely be contended that a tax assessment made by the Arkansas Corporation Commission is immune from judicial

scrutiny and determination by the Bankruptcy Court under the authority conferred upon that court by section 64 of the act which relates to any taxes as to which any question arises.

Article I, Section 8, Clause 4, of the Constitution of the United States provides that "Congress shall have power to establish * * * uniform laws on the subject of bankruptcies throughout the United States." This provision has been consistently and uniformly construed by this Court, and by all the subordinate courts of the land, to confer upon Congress plenary and exclusive powers in dealing in bankruptcies, and where Congress, in the exercise of this power, confers upon the Bankruptcy Court jurisdiction to deal with certain matters pertaining to the bankrupt's estate, this has been held to mean an exclusive jurisdiction and to deprive the state courts of any further jurisdiction therein.

In re Wood and Henderson, 210 U. S. 246, at page 254, it was held by this Court that "Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular district court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert claims."

In *United States Fidelity and Guaranty Co. v. Bray*, 225 U. S. 205, at page 217, this Court said:

> "We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the deter-

mination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them."

And in *Van Huffel v. Harkelrode,* 284 U. S. 225, at page 228, this Court, speaking through Mr. Justice Brandeis, said:

"No good reason is suggested why liens for State taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the Court express authority to determine 'the amount or legality' of any tax * * *. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration."

And in *New York v. Irving Trust Co.,* 288 U. S. 329, at page 333, it is said: "The Federal Government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

And in *New Jersey v. Anderson,* 203 U. S. 483, at page 493, this Court, speaking through Mr. Justice Day, in referring to the amount of a franchise tax assessed by a state board, which had been allowed in a lesser sum by the Bankruptcy Court, said: "But we do not think the finding of the State Board is conclusive * * *. Section 64a specifically provides that in case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the Court, with a view to determining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character * * *."

The decisions of this Court, above cited, cover a long span of years—New Jersey v. Anderson having been decided in 1906—more than thirty-four years ago. And in the 1938 revision of the Bankruptcy Act, Congress re-enacted this provision of the Bankruptcy Act, in Section 64 (52 Stat., at page 874), vesting in the Bankruptcy Court jurisdiction to hear and determine the amount or legality of any taxes, as to which any question might arise, in even more comprehensive terms than this provision appeared in the prior act.

In a very recent case, *Kalb v. Feuerstein*, 308 U. S. 433, this Court had before it an appeal from the Supreme Court of Wisconsin which had affirmed a judgment of the Circuit Court of Walworth County sustaining a demurrer to a bill in equity, brought by Kalb, asking for cancellation of a Sheriff's deed to a farm owned by him, restoration of possession and other relief. The Sheriff's deed had been issued under a decree of foreclosure of a mortgage, and the sale was confirmed by the state court while Kalb had pending in the bankruptcy court a petition for composition and extension of time to pay his debts under Section 75 of the Bankruptcy Act (11 U. S. C. A. 203).

In reversing the Wisconsin court, and holding that the confirmation of the Sheriff's deed by the state court and the subsequent ouster of Kalb from possession of his farm were illegal and void, this Court, in a unanimous opinion delivered by Mr. Justice Black, said (page 439):

> "Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress, in the exercise of its supreme power over bankruptcy, that no state court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to col-

lateral attack. The states cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.

"The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy court exclusive jurisdiction over the farmer-debtors and their property, and has by its act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its act in the supreme law of the land which all courts—state and federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

The cases above cited establish, beyond any possibility of question, the rule that where Congress has conferred upon the bankruptcy court jurisdiction to deal with any question pertaining to the estate of the bankrupt, this jurisdiction is exclusive and the courts of the state are thereby deprived of any further jurisdiction which they may have possessed except for the bankruptcy.

And they further establish the fact that, under the provisions of section 64 of the act, whenever any question arises as to the amount or legality of any taxes asserted against a bankrupt estate, the exclusive jurisdiction to hear and determine this question is vested in the Bankruptcy Court.

The cases of Missouri Pacific Railroad Company v. Conway and Vilonia Road District, 280 Fed. 401, and McLaughlin v. St. Louis Southwestern Ry. Co., 232 Fed. 579, cited at page 24 of petitioners' brief, did not, in either

case, involve a bankruptcy proceeding, and neither of those decisions is at all in point on the question now before this Court.

3. The Provision of Section 64 of the Bankruptcy Act, "That in Case Any Question Arises as to the Amount or Legality of Any Taxes, Such Question Shall Be Heard and Determined by the Court," Is Not Inconsistent With Section 77 of the Act, and Is of Governing Force in Proceedings Under Section 77.

With due deference to the learned author of Finletter on Bankruptcy Reorganization, from which book counsel for petitioners quote at some length at page 25 of their brief, it is respectfully submitted that the conclusion reached is erroneous, at least so far as concerns the jurisdiction conferred on the Bankruptcy Court to hear and determine the amount or legality of any taxes as to which any question arises.

As a matter of fact, the quotation from Finletter on Bankruptcy Reorganization, as shown on page 25 of petitioners' brief, does not refer to **"the jurisdiction and power of the Court"** at all, but refers solely to the rights and priorities of certain classes of creditors.

Paragraph (1) of Section 77, as same appears in the revision of August 27, 1935 (49 Stat., at page 922), is precisely the same as paragraph (n) of the Act of March 3, 1933 (47 Stat., page 1481), and provides as follows:

> "In proceedings under this section, and consistent with the provisions thereof, the jurisdiction and powers of the Court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when debtor's petition was filed."

Now it is perfectly true that there are some rights and priorities of creditors, as provided in section 77, which vary from the rights and priorities as set forth in section 64—and where this occurs the rights and priorities as provided in section 77 will, of course, govern in a reorganization proceeding under that section.

However, there is not the slightest inconsistency, in any respect whatever, between any provision of section 77 and the jurisdiction and power of the Bankruptcy Court to hear and determine any question as to taxes, under the mandate of section 64.

Furthermore, it is most interesting to note that whereas Section 77B of the Act dealing with Corporate Reorganizations other than Railroads (now Chapter X of the 1938 revision) provides that certain sections of the original act, including section 64, shall not apply until there has been an order of liquidation, there is no such provision in section 77, which makes all of the provisions of the original act, as to the jurisdiction and powers of the Court, etc., applicable to a proceeding thereunder unless inconsistent with some provision thereof.

It will be recalled that both of these amendments to the Bankruptcy Act, Section 77, dealing with railroad reorganizations and the present Chapter X (originally Section 77B) dealing with Corporate Reorganizations other than railroads, were enacted very close together, the former on March 3, 1933, and the latter on June 7, 1934, as parts of an effort on the part of Congress to afford relief to the industrial organizations of the Nation during a period of widespread financial distress.

As originally enacted, Section 77B (now Chapter X) provided in paragraph k that

"If an order is entered directing the trustee or trustees

to liquidate the estate * * * (5) debts shall be entitled to priority as provided in Section 64 * * * (but) none of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j) and (m) of Section 57, and subdivisions (a) and (e) of Section 70, shall apply to proceedings instituted under this Section 77B **unless and until an order has been entered directing the trustee or trustees to liquidate the estate**" (48 Stat., at page 921).

As finally amended, in the Act of June 22, 1938, this provision is modified somewhat, and reads:

"Section 102. The provisions of Chapters I to VII inclusive, of this Act shall, in so far as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter. **Provided, however,** That Section 23, subdivisions h and n of Section 57, **Section 64** (emphasis ours), and subdivision f of Section 70, shall not apply in such proceedings **unless an order shall** be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters I to VII, inclusive" (52 Stat., p. 883). (Emphasis ours.)

Now it is highly significant that, in these two statutes enacted for generally similar purposes, although dealing with different kinds of corporations, and so nearly at the same time, section 64 is expressly excluded from operation in connection with chapter X (formerly section 77B) until there had been an order of liquidation, while, under section 77, no such exclusion is made, but, on the contrary, all of the preceding provisions of the act as to the jurisdiction and powers of the Court (including, because not excepted, section 64) are made applicable thereto with the single proviso that such former provisions of the act shall not be inconsistent with the provisions of section 77.

This was pointed out by the United States District Court for the District of Colorado, *In re Denver & Rio Grande*

Western R. R. Co., 23 Fed. Supp. 298, at page 301, where the Court says: "The proviso in paragraph (k) of Section 77B, 11 U. S. C. A., Section 207 (k), limiting the application of Section 64 (a) to proceedings after an order of liquidation has been made * * * is not contained in Section 77. The omission is significant and indicates, we think, the intent of Congress to confine the proviso to Section 77B cases only."

And we would repeat that there is not the slightest inconsistency between the provision of section 64, conferring upon the Bankruptcy Court exclusive jurisdiction to hear and determine any question as to the amount or legality of any taxes, and any provision of section 77. Paragraph (c) (7) of section 77 provides for the fixing, by the Bankruptcy Court, of a reasonable time for the filing of claims and for the classification of claims by the Court. Such classification must, of course, recognize the priorities, in accordance with the provisions of this section, but nowhere in said section can there be found any provision which is in the slightest degree inconsistent with the authority conferred upon the Bankruptcy Court by section 64, to hear and determine any question as to tax claims. To the contrary, there are provisions in section 77 which indicate most clearly that this power and authority in the bankruptcy court is wholly consistent with the plan and purpose of that section and highly desirable, if not absolutely essential, in the consummation of a reorganization thereunder. Elsewhere in their brief, at pages 30-31, counsel for petitioners contend that taxes accruing during the reorganization of a railroad, and following its adjudication as a debtor, are to be classed as costs of administration or part of the necessary cost and expense of preserving the estate. In this contention we agree with counsel for petitioners, and we regard this question as settled by the decision of this Court in *Michigan v. Michigan Trust*

Company, 286 U. S. 334, at page 344, where it is said: "Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of administration and therefore charges to be satisfied in preference to the claims of general creditors."

And viewing taxes accruing during the Trustee's possession of the property in this light, it will be observed that subsection (e) of section 77 provides that the judge (of the Bankruptcy Court) shall approve the plan if satisfied as to several things, among which is (3) that "the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge," except that allowances for which provision is made in subsection (c), paragraph (12), which may be allowed within such maximum limits as are fixed by the Interstate Commerce Commission, may be paid in securities provided for in the plan if those entitled thereto will accept such payment.

As the bankruptcy court is, unquestionably, vested with jurisdiction to fix and determine the amount of other costs of administration, subject to the right of the Interstate Commerce Commission to fix maximum limits for certain allowances, no good reason can be seen why the bankruptcy court should not hear and determine any question as to the amount or legality of tax claims, which are included as costs of administration. Most certainly the holders of claims in the subordinate classes are very much concerned with the limitation of all items of administration expense to a proper and legitimate basis, because their right to participate in the plan of reorganization may depend upon the amount of administration expense.

And while it is doubtless true, as appellants contend,

that there will be no liquidation in the sense of the ordinary bankruptcy, nevertheless the whole purpose of a reorganization under section 77 would be frustrated if the property cannot be turned over to its ultimate owners, upon final approval of the plan, with definitely known and valid liens, in such aggregate amount as the earnings of the property may enable it to carry. And the Bankruptcy Court is charged with the immediate supervision of the reorganization and the limiting of claims against the property to such claims as are valid and proper, and the classification of all claims according to law.

That the provision of section 64, conferring on the Bankruptcy Court to hear and determine the amount or legality of any tax, as to which question arises, is applicable to a reorganization proceeding under section 77 was, as we have already pointed out, squarely decided in the two St. Francis Levee District cases (cited supra). The same holding is reiterated, in a most comprehensive manner, in the opinion of the Circuit Court of Appeals in the present case (R. pp. 38-39), 116 Fed. (2nd), at pages 181-182. The same ruling has been made by the United States District Court for the District of Colorado, *In re Denver & Rio Grande Western Railroad Co.*, 23 Fed. Supp. 298, at page 301.

We of course recognize the fact that the denial by this Court of certiorari does not necessarily imply an affirmance or approval of the holding of the United States Circuit Court of Appeals. However, we would point out the fact that since the denial of certiorari in the first St. Francis Levee District case, on November 22, 1937 (302 U. S. 750), Section 64 of the Bankruptcy Act has been amended, in the Act of June 22, 1938 (52 Stat., at page 874), in terms even more comprehensive than the corresponding provision of the prior act, and since the denial of certiorari in the sec-

ond St. Francis Levee District case, on November 13, 1938, Congress has amended subsection (n) of Section 77, in the Act approved August 11, 1939 (53 Stat., at page 1406), without, in either case, any suggestion of an intent to change the rule as to the jurisdiction and power of the Bankruptcy Court, in proceedings under section 77, to hear and determine any question as to taxes, as construed by the United States Circuit Court of Appeals in the two St. Francis Levee District cases.

In 59 Corpus Juris, at page 1064, the rule is stated that:

> "Reenactment of a statute after it has been construed by an intermediate or inferior court is not a legislative adoption of such construction; but where, after a construction of a statute by an intermediate court, the court of last resort has denied a writ of error to review the case, the subsequent reenactment of the statute is strongly persuasive that the legislature adopted it with the construction placed thereon by the intermediate court."

That rule, we submit, is applicable here.

We would further point out the very unfortunate consequence, in the present case, of a reversal of the rule, in this connection, as laid down in the two St. Francis Levee cases. In reliance upon that rule, the Trustee, in the present case, appealed to the Bankruptcy Court as the proper tribunal to hear and determine the questions presented as to the amount and legality of the disputed tax assessment. He did this promptly—before the tax became due. However, should it now be held that the Bankruptcy Court is not vested with jurisdiction, in a proceeding under section 77, to hear and determine this question, the Trustee is deprived of any right to a judicial review of the disputed assessment, because section 2019 of the Arkansas statutes, which is set out at page 44 of petitioners' brief, only per-

mits an appeal to the Circuit Court of Pulaski County within thirty days after the entry of the order of the Arkansas Corporation Commission. Incidentally, it will be noted that, according to the averment of the Trustee's petition (R. 7), the assessment finally made by the Corporation Commission was certified to the Assessor for the fifty-one counties on December 5, 1939, one day after the final order of that Commission, and long before the expiration of the thirty days allowed for an appeal to the Circuit Court under the provisions of the Arkansas statute.

4. The Jurisdiction to Hear and Determine Any Question as to Taxes, Under the Provision of Section 64a of the Bankruptcy Act, Extends to Taxes Accruing During the Trustee's Possession of the Property.

The provision of section 64a, as in effect prior to the revision or amendment of June 22, 1938 (52 Stat., at page 874), had been construed, in a number of cases, as vesting in the Bankruptcy Court jurisdiction to hear and determine any question as to taxes after the Trustee acquired possession of the property.

Thus, in *Henderson County, N. C., v. Wilkins*, 43 Fed. (2nd) 670, a decision by the Court of Appeals for the Fourth Circuit, the trustee in bankruptcy had complained of the assessed value, for ad valorem taxes, of a hotel property in his hands, and had petitioned the bankruptcy court to reduce same. The taxing authorities had assessed the property for taxation at a valuation of $250,000. The valuation was reduced, upon a hearing before the referee in bankruptcy, to $110,000.00, and the findings of the referee were approved and confirmed by the Bankruptcy Court. This action was affirmed, on appeal, by the Circuit Court of Appeals. In the opinion of that Court it is said (page 671):

"The first question raised by appellants is as to the power of the bankruptcy court to reduce the taxes assessed against the property in the hands of the trustee by the taxing officials of the county and municipality. We think, however, that there can be no doubt that the court has this power."

The opinion then quotes Section 64a of the Bankruptcy Act and proceeds as follows:

"Although the property in question was in the hands of the bankruptcy court when the taxes for 1927 and 1928 were levied, it was subject to taxation by the authorities of the county and municipality. Swarts v. Hammer, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060; Dayton v. Standard, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190. It was the duty of the county and municipal authorities, however, to tax it according to its true value in money. Constitution of N. C., Article V, Sec. 3; Code 1927, North Carolina, Sec. 7971 (46). And, when a question arose as to whether it had been properly valued for purposes of taxation or not, this was a matter for the determination of the bankruptcy court under the statute quoted above, as the question involved was one as to the amount of the tax to be paid from the estate. It is well settled that in determining such a question the court is not concluded by the findings of the taxing authorities. New Jersey v. Anderson, 203 U. S. 483, 493, 27 S. Ct. 137, 141, 51 L. Ed. 284; Truman, Treas., v. Thalheimer (C. C. A. 9th), 19 F. (2nd) 468; In re Sheipman (D. C.), 14 F. (2nd) 323; In re Simcox (D. C.), 243 F. 479; In re United Five and Ten Cent Store (D. C.), 242 F. 1005. Its action is not a review of the action of the taxing authorities or a proceeding to enjoin action by them, but a determination under the statute of the amount which should be paid for taxes from the assets of the estate in its possession. In re E. C. Fisher Corporation (D. C.), 229 F. 316, 318."

And in Dickinson v. Riley, 86 Fed. (2nd) 385, there had

been an adjudication of bankruptcy on January 8, 1932. The tax claims in controversy covered taxes for the years 1929-1933, inclusive, including two years during which the trustee was in charge of the property. The taxing authorities contended that the court of bankruptcy had no power or jurisdiction to go into the question of excessive valuation of the property taxed. While sustaining the original assessment, under the evidence in that case, the Court of Appeals held that the great weight of authority was in favor of the right of the bankruptcy court, by reason of the provisions of section 64a, to hear and determine whether the value at which the property was assessed was the proper and correct value as provided by the taxing statutes of the sovereignties or public entities which assessed and levied the taxes.

It was also held by the United States District Court for the District of Colorado, *In re Denver & Rio Grande Western R. R. Co.*, 23 Fed. Supp. 298, that the Bankruptcy Court was the proper forum in which to hear and determine the amount or legality of taxes assessed against a railroad debtor in reorganization under Section 77 of the Bankruptcy Act, and all questions in relation thereto. While it is not so specifically stated in the opinion of the District Court, in the case last cited, it is a fact that the taxes in question, for the year 1937, accrued long after the adjudication of the railroad as a debtor and while the trustees were in possession thereof and operating same—the order of adjudication of that railroad as a debtor having been made on November 1, 1935, and the trustees having been appointed on November 18, 1935.

So also in the two St. Francis Levee District cases (cited supra) the taxes involved accrued, subsequent to the adjudication of the railroad company as a debtor, in a reorganization proceeding under section 77.

We are aware of no decision, by any court, holding that this provision of section 64a does not apply to taxes accruing during the trusteeship.

We have remarked, earlier in this argument, that the amendment of Section 64a, in the Act of June 22, 1938, was in even more emphatic and comprehensive terms than the corresponding provision in the prior act. This is true because in the prior act (11 U. S. C. A. 104) this section, after providing that "the Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State," etc., this section went on to provide that "in case any question arises as to the amount or legality of any **such** tax the same shall be heard and determined by the Court"—so that there was, under the prior act, at least some ground for the contention that "any such tax" referred to taxes accruing against the bankrupt prior to adjudication. But, as we have pointed out, the courts uniformly held that this provision also included taxes accruing while the trustee was in possession of the property.

When Congress amended this section in the Act of June 22, 1938, it was presumably in full knowledge of the fact that this Court had denied certiorari, on November 22, 1937, in the first St. Francis Levee case (302 U. S. 750), and under the principle enunciated in 59 Corpus Juris, at page 1064 (cited supra), this fact "is strongly persuasive that the Legislature adopted it with the construction placed thereon" in that case, in which it was held, 91 Fed. (2nd), at page 120, that "the question of the amount and validity of the levee tax lien must be submitted to the bankruptcy court and settled by it." And Congress, when amending this section, did not provide that any question as to the amount or legality of any **such** tax should be heard and determined by the Court, but instead provided

(52 Stat., at page 874) "that in case any question arises as to the amount or legality of **any taxes**, such question shall be heard and determined by the Court."

At pages 28-31 of this brief, counsel for petitioners contend that the taxes accruing during the Trustee's operation of the property constitute administration expense. As we have stated, under the preceding head of this argument, we agree with them in this contention. But this does not at all help their argument. Section 64a covers other kinds of administration expense, all of which are to be determined by the Bankruptcy Court—and along with these other items of administration expense section 64a confers upon the bankruptcy court jurisdiction to hear and determine any question as to the amount or legality of any taxes.

The case of Boteler v. Ingels, 308 U. S. 57, cited at pages 28-29 of petitioners' brief, is not in point at all. That case involved the claim of a trustee in bankruptcy to exemption from penalties provided by a California statute for non-payment, by a certain date, of vehicle license and registration fees when the vehicle is operated without registration. As appears from the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, 100 Fed. (2nd) 915, which was affirmed by this Court, the trustee in bankruptcy had operated certain milk delivery trucks upon the public highways of California for some weeks after the license fees became due, without paying same, and the Department of Motor Vehicles of the State thereupon assessed penalties as provided in the state law, which the trustee refused to pay. The reliance of the trustee was upon Section 57j of the Bankruptcy Act, which provides that "debts owing to the United States or any State or subdivision thereof, as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act * * *."

Now Section 57 of the Bankruptcy Act, in its entirety, including every subsection thereof, refers to claims accruing prior to the adjudication. No part of this section refers, in any manner whatsoever, to administration expense or to claims against the trustee—and the Court of Appeals held that this section afforded no protection to the trustee against the state's claim for penalties, and further held, that under the provisions of Section 124a of the Judicial Code (48 Stat. 993) a trustee in bankruptcy conducting a business, as this trustee was, is subject to all state and local taxes "applicable to such business the same as if such business were conducted by an individual or corporation," and that the penalties formed part of the tax for which the trustee was liable. In so holding the decision of the Court of Appeals was affirmed by this court.

Incidentally, it will be noted that the question of the amount or legality of the penalty tax claims involved in the Boteler case was heard initially in the Bankruptcy Court (the District Court of the United States for the Southern District of California) pursuant to a petition filed therein by the trustee. That Court initially decided the controversy in favor of the trustee, and its decision was reversed by the United States Circuit Court of Appeals solely on the merits of the claim.

In the case at bar no claim is asserted by the Trustee that he is not liable for any and all taxes applicable to the property held by him or the business conducted by him, as called for in the laws of the state. But the Trustee does claim that the property in his possession may not properly be assessed for taxation by the Arkansas Corporation Commission on a basis vastly in excess of the true market value thereof, in violation of the Constitution and of the Statutes of Arkansas—and he further contends that, under

the mandate of Section 64a of the Bankruptcy Act, the Bankruptcy Court is the forum, and the only forum, vested with jurisdiction to hear and determine this question.

The question involved in Thompson v. State of Louisiana, 98 Fed. (2nd) 108, cited at pages 29-30 of petitioners' brief, is utterly foreign to the question now before the Court. That case involved the liability of the trustee for corporation franchise taxes, which the trustee contended were applicable, under the statute of the state, solely to corporations. Incidentally that question was heard and determined by the Bankruptcy Court.

Also, the decision in Hennepin County v. M. W. Savage Factories, 83 Fed. (2nd) 453, and in Robertson v. Goree, 29 Fed. (2nd) 261, and in MacGregor v. Johnson-Cowdin-Emerich, 39 Fed. (2nd) 574, cited at pages 30 and 31 of petitioners' brief, are utterly unrelated to the question here in issue. Neither of those cases involved any question as to the amount or legality of taxes—the question at issue being solely the obligation of the trustee to pay, as cost of administration, taxes which had accrued upon property which the trustee had used and occupied during the time he held same, and (in the Savage case) for which the Receiver had paid no rental, nor had he paid interest upon a mortgage upon the property. When he had no further use for the property, after having occupied same for several years, the trustee alleged that the estate had no equity in the property and sought to escape payment of taxes which had accrued during his occupancy, under another provision of section 64a, "that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the Court." The mortgagee in the Savage case asked the Court to order the trustee to secure release of the lien for taxes, on property

so occupied, which had accrued during the trustee's occupancy. No question as to the amount of these taxes was involved at all, nor did either of these cases involve the provision of section 64a that "in case any question arises as to the amount or legality of any tax, such question shall be heard and determined by the Court." Manifestly, these decisions have no bearing whatever upon the question now at issue. This Court held in the Savage case that "to escape the obligation to pay such taxes, a receiver must, within a reasonable time, repudiate the property as a burden upon the estate. He cannot accept the benefits and escape the burdens of operation."

In every case which has thus far been decided by the courts, where this question has been directly presented, it has been held that the jurisdiction conferred upon the bankruptcy court to hear and determine the amount or legality of any taxes, as to which question may arise, applies to taxes accruing during the trustee's possession of the property. As already pointed out, this section was amended by Congress, and reenacted in even more comprehensive form in the Act of June 22, 1938, and this was after the denial by this Court of certiorari in the first St. Francis Levee District case, in which the Circuit Court of Appeals had specifically held that this provision of section 64a applied to taxes accruing during the trusteeship.

5. The Preliminary Order of the District Court, Entered on April 11, 1940, Was Not an Injunction, and, a Fortiori, It Was Not in Violation of Section 24 of the Judicial Code.

The order did not enjoin or restrain the state authorities from doing any act. This is perfectly apparent from a perusal of the order itself (R. 17-21).

Section 24 of the Judicial Code as amended (50 Stat. 738), was enacted on August 21, 1937. This amendment provides that "no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state."

In the present case, the assessment had already been made, in the Commission's order of December 4, 1939 (R. 7). It is true that the Court proposed, under the jurisdiction conferred upon it by Section 64a of the Bankruptcy Act, to hear and determine the amount or legality of such assessment, but there was nothing in the Court's order which enjoined or restrained the Arkansas Commission from performing any act in connection with the assessment.

Precisely the same remark applies to the levy of taxes pursuant to the assessment. This levy had already been made when the Trustee's petition was filed (R. 11), following the certification of the assessment by the Corporation Commission to the several county assessors on December 5, 1939—the day after the final assessment was made by the Commission (R. 7). Nothing in the Court's order enjoined or restrained the county authorities from performing any act in connection with the levy of taxes.

And the same thing is true as to the collection of the taxes. They had not been collected when the Trustee's petition was filed and the Court's order entered on April 11, 1940. They were not even due at that time (R. 14). The Trustee challenged the assessment, and the resulting tax, because he believed same to be exorbitant and illegal, but his petition did not ask, nor did the Court's order grant, any injunction or restraint against the officers of

the state or of the counties in connection with the collection of the taxes.

It is perfectly true that the Bankruptcy Court would not, presumably, have permitted any forcible seizure or sale, by the state or county authorities, of property under the Court's custody (Ex parte Baldwin, 291 U. S. 610, at page 616), but this was because of the inherent power of that Court, as conferred upon it by Congress, and not because of anything prayed in the Trustee's petition. This protection of the property under its custody from seizure or sale for taxes would have been exercised by the Court had the Trustee's petition never been filed.

All that the Trustee's petition did was to request the Bankruptcy Court to hear and determine the amount and legality of these taxes which, the petition averred, were based upon an assessment made in violation of the Constitution and of the statutes of the State of Arkansas. Pending the determination of this question, in order to avoid undue embarrassment to the taxing districts, the Trustee asked leave of the Court to pay taxes for the year in question in an amount conceded to be based upon a legitimate assessment—and the petition further prayed, in paragraph 14 (R. 15), that the question as to the disputed balance be heard and determined as expeditiously as possible.

This, we submit, was the orderly and expeditious manner of disposing of the dispute. An order of the Bankruptcy Court to pay all or some specified amount of the balance in dispute would, of course, have been complied with, subject to the right of either party to appeal therefrom, and no occasion for conflict between the Bankruptcy Court and the taxing authorities by reason of an attempted seizure or sale of the property, would or could have existed. The delay, of almost a year, which had occurred,

has been due entirely to the procedure which the taxing authorities have elected to pursue in an effort to escape any judicial review of the assessment in question.

In *Henderson County, N. C., v. Wilkins*, 43 Fed. (2nd) 670, at page 672, in referring to a similar petition filed in a bankruptcy proceeding by the trustee, and to the jurisdiction and power of the bankruptcy court in dealing with such petition, the Court said: "Its action is not a review of the action of the taxing authorities **or a proceeding to enjoin action by them,** but a determination under the statute of the amount which should be paid on the claim for taxes from the assets of the estate in its possession."

It is perfectly manifest that if respondent's contention, that Section 24 of the Judicial Code interposes a barrier to a proceeding of this character, is correct, then the provision of Section 64a of the Bankruptcy Act, conferring upon the Bankruptcy Court jurisdiction to hear and determine the amount or legality of any tax as to which any question might be raised, is utterly meaningless, because such a hearing and determination by the Bankruptcy Court in a liquidating bankruptcy proceeding, as to taxes accruing prior to the adjudication, would be no more or no less "an injunction" than is the present proceeding. And we would again point out that section 64a in its present form (52 Stat. 874) was enacted by Congress almost a year after the last amendment of Section 24 of the Judicial Code (52 Stat. 738) was enacted. And section 64a in its present form was enacted seven months after this court had denied certiorari, on November 22, 1937, in the first St. Francis Levee District case, 91 Fed. (2nd) 118, in which the United States Circuit Court of Appeals had specifically held that "the question of the amount and validity of the levee tax lien must be submitted to the Bankruptcy Court and settled by it."

The first St. Francis Levee District case involved taxes which had accrued during the trustee's possession of the property in a reorganization under section 77, and in that decision there was also presented an injunction in another federal court brought by the trustee, pursuant to instructions from the Bankruptcy Court, restraining the further prosecution of suits in the state courts of Arkansas. And this injunction was sustained on appeal.

In the second St. Francis Levee District case, 98 Fed. (2nd) 394, precisely similar facts were presented, except that the injunction therein was issued direct by the Bankruptcy Court, and this injunction was likewise upheld by the United States Circuit Court of Appeals, which held that, in a bankruptcy proceeding, Section 24 of the Judicial Code interposed no barrier thereto. And certiorari was again denied by this Court (305 U. S. 647).

We say, then, that while the petition of the Trustee in the present proceeding, and the order of the Bankruptcy Court therein, did not constitute an injunction, a fortiori was the Court's order not in violation of Section 24 of the Judicial Code. The conclusive answer to this contention of petitioners is most clearly stated in the opinion of the United States Circuit Court of Appeals in the case at bar (R. 40-41).

6. Even Though the Arkansas Statutes May Provide for a Judicial Review in the State Courts, of the Assessments Made by the Corporation Commission, This Does Not Deprive the Bankruptcy Court of the Jurisdiction to Hear and Determine the Amount or Legality of Any Tax as to Which Any Question May Arise.

We would remark, in passing, that there is grave doubt as to the adequacy of the provision of the Arkansas statute for a judicial review in the State Court, under the facts

existing in the present case. The statute provides for an appeal to the Circuit Court of Pulaski County within thirty days after the entry of record of the Arkansas Corporation Commission. As is averred in the Trustee's petition (R. 7) the final order by that Commission was made on December 4, 1939, **and upon the following day,** December 5, 1939, this assessment was certified by the Commission to the collectors for the fifty-one counties, who (R. 11) promptly extended same upon their tax rolls. The Arkansas statute is silent as to the effect, upon the liens thereby created, of a subsequent appeal to the Circuit Court of Pulaski County, even though such appeal had been prosecuted within the thirty-day period.

And it is most definitely certain that the procedure outlined in the Arkansas statute would not realize, for the several taxing units, the amounts which might ultimately be found due by the state courts with anything like the promptness which would be realized by an order from the Bankruptcy Court to the Trustee following a hearing and determination by that court of the amount properly due in response to the prayer of the Trustee's petition. As will be observed from the preliminary order of the Bankruptcy Court (R. 18-20) the Trustee was instructed to pay taxes for the year in question, aggregating $620,645.03, pending the final determination of the total amount properly due.

However, entirely irrespective of the question as to the adequacy of the right of judicial review of an assessment by the Arkansas Corporation Commission, as ultimately provided by the statutes of that state, under the legislative history set forth on pages 33-34 of petitioners' brief, it is most certain that such right to judicial review in the state courts could not, and did not, deprive the Bankruptcy Court of the jurisdiction to hear and determine the amount or legality of any taxes, as to which question might arise, under the mandate of Section 64a of the Bankruptcy Act.

The law upon this question is most succinctly stated in the opinion of the United States Circuit Court of Appeals, in the present case (R. 41), as follows:

> "Whether or not there are state laws under which the trustee in bankruptcy might obtain a determination by the state courts of the amount or validity of the disputed state taxes allowable as liens and as part of the cost and expense of administration in bankruptcy is immaterial. The power to make the determination has been expressly conferred upon the bankruptcy court by special provision which is an integral part (fol. 52) of the plan of bankruptcy administration of the property brought within its exclusive jurisdiction."

This excerpt from the opinion of the Court of Appeals is abundantly sustained by numerous decisions of this Court, a few of which have been heretofore cited in this argument under the caption "Powers of Bankruptcy Court." We would especially again direct attention to the very recent decision of this Court in *Kalb v. Feuerstein*, 308 U. S. 433, from which we quoted at some length under that head. And we would remark that what was said by this Court in that opinion, with respect to the exclusive jurisdiction of the Bankruptcy Court in dealing with farmer-debtors, applies with equal force to the exclusive jurisdiction of a bankruptcy court, within the authority conferred by the act, when dealing with a liquidation in bankruptcy, under the original act, or with the reorganization of a railroad-debtor under section 77.

None of the decisions cited by petitioners, at pages 34-37 of their brief, deal with a bankruptcy proceeding at all, and they are, therefore, utterly inapplicable to the question now under consideration.

7. The Issue Presented in the Trustee's Petition Is Clearly Justiciable.

The cases upon which petitioners chiefly rely, by their contention, at pages 39-42 of their brief, that the issue presented in the Trustee's petition is nonjusticiable, i. e., Railroad Commission v. Rowan & Nichols Oil Company, 310 U. S. 573; Nashville, Chattanooga & St. Louis Railway v. Browning, 310 U. S. 362, and Central Railroad Company of New Jersey v. Martin, 115 Fed. (2nd) 968, all involved controversies in which the jurisdiction of the federal courts was invoked solely in reliance upon the claim that the order or finding of the State Board of which complaint was made was in violation of the Fourteenth Amendment to the Constitution of the United States.

Passing for the moment the question whether the assessment of Trustee's property by the Arkansas Corporation Commission was in violation of the Fourteenth Amendment, it will be observed that this is by no means the only "question as to the amount or legality of the taxes" in dispute which is presented by the Trustee's petition. We have already referred, in opening statement of this brief, to the averments of the petition, and will here again only briefly point out that the petition alleges that, whereas the Constitution of Arkansas (Article XVI, Section 5) provides that "all property subject to taxation shall be taxed according to its value," and Section 2044 of the Arkansas Statutes (set out in appendix, on page 44 of petitioners' brief) provides that all assessments made by the Arkansas Commission "shall be made upon the consideration of what a clear fee-simple title thereto would sell for under conditions under which that character of property is usually sold," and Section 2048 of the Arkansas Statutes (set forth in appendix hereto) provides that "the true market or actual value of the entire property"

shall first be ascertained and then the state's portion, of a facility operating in different states, allocated in the manner provided in the statute, as a matter of fact the assessment, both for the year in question and for years prior thereto, was very greatly in excess of the actual value thereof, after giving consideration to an equalization factor of the same amount as that applied to other classes of property in said state.

Petitioners correctly say, at page 4 of their brief, that there is no controversy as to either the allocation factor or the equalization factor used in arriving at the assessment—and the entire controversy hinges upon the **System Value** as found by the Arkansas Corporation Commission of the railroad properties of the Missouri Pacific Railroad, now held and operated by the Trustee subject to the orders of the Bankruptcy Court—a system operating in eight states, i. e., Arkansas, Colorado, Illinois, Kansas, Louisiana, Missouri, Nebraska and Oklahoma.

It will also be noted from a comparison of paragraphs 8 (R. 9-10) and 10 (R. 11) of the Trustee's petition that the excessive assessment of $11,220,000 ($28,050,000 as actually made as contrasted with a maximum proper assessment of $16,830,000) is based upon a system value, as found by the Commission, of $246,970,234, which is **more than one hundred million dollars** in excess of "the true market or actual value" of the system on January 1, 1939, which the Arkansas statute requires to be the basis for the assessment of the property.

It has been expressly held by this Court, in *Dawson v. Kentucky Distilleries*, 255 U. S. 288, that in a proceeding over which the federal court has jurisdiction, an assessment for state taxation, found to be in violation of the Constitution or statutes of the assessing state, will be annulled.

Most certainly the Bankruptcy Court has jurisdiction to hear and determine the amount or legality of a tax sought to be imposed upon property in its custody, as to which question is raised, and in making this determination that Court will give due consideration to the statute of the state, under which the tax is sought to be imposed. And where the disputed tax is shown to be in violation of the statutory requirements of that state, the Bankruptcy Court will readjust the tax in conformity thereto.

New Jersey v. Anderson, 203 U. S. 483;
In re Gustav Schaefer Co., 103 Fed. (2nd) 237,

wherein the Court says:

> "This provision" (section 64a of the Bankruptcy Act) "is found in the Act of July 1, 1898, 30 Stat. 563, and courts have ruled with unanimity that the Bankruptcy Court is not irrevocably bound by an irrebuttable presumption of validity and correctness of the assessment made by the taxing authorities. The language of the statute is plain that it is the duty of the Court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to the local taxing statutes."

The decision of this Court in Rowley v. Chicago & North Western Railway Company, 293 U. S. 102, to which reference is made at page 38 of petitioners' brief, did not involve any dispute as to the sytem value of the railroad, but solely the question of a proper allocation factor for that portion of the property within the State of Wyoming. As a matter of fact, both the State Board and the Railroad Company were in accord, in that case, that the system value should be determined by the market value of the railroad's stocks and bonds and its capitalized net operating income, averaged over a five-year period—a method

for the determination of system value which has been approved in numerous cases, including

Great Northern Ry. v. Weeks, 297 U. S. 135;
Chicago & Northwestern Ry. v. Eveland, 13 Fed. (2nd) 442;
Bailey v. Megan, 102 Fed. (2nd) 651,

and which, if applied in the present case, produces a system value more than one hundred million dollars beneath that used by the Arkansas Corporation Commission in arriving at its final assessment.

The cases above cited all involved injunction suits, which would possibly not now be entertained since the enactment of Section 24 of the Judicial Code in its present form. However, these decisions are certainly indicative of the views entertained by the courts as to a proper basis for determining the true market value of a railroad system.

Reverting for a moment to the decision in the Rowley case, this Court therein said (293 U. S., at page 110): "The determination is to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property."

That is precisely what the Trustee's petition, in the present case, avers that the Arkansas Corporation Commission did not do. On the contrary, the petition alleges that the Arkansas Commission arrived at the system value of the property by the use of methods which utterly failed to give consideration to conditions and values of railroad property as of January 1, 1939 (the assessment date under the statute), and which have been condemned by the courts, not only in the cases above cited, but also by this Court in numerous cases involving the determination of

true market value, apart from railroad assessments, such as

Standard Oil Company v. Southern Pacific Company, 268 U. S. 146;
A. B. & C. R. R. Co. v. United States, 296 U. S. 33.

Petitioners cite no decision of the Arkansas courts holding that true market value, under present-day conditions can be determined upon the basis of the original cost of the property, many years ago, or the amount which would be necessary to reproduce the property, and we confidently assert that no such decision can be found. Most certainly such factors have been uniformly condemned by this Court and by the United States Circuit Courts of Appeal, as improper determinants of present-day true market value. The Trustee's petition alleges, and the Trustee is prepared to prove, that the system value used by the Arkansas Commission in arriving at its assessment was enormously excessive and "manifestly outside of the range of the facts, so as to amount to an arbitrary abuse of power."

Petitioners have much to say as to the indulgence which should be accorded to a finding of the Corporation Commission. This, of course, involved a question of proof, and, we submit is premature in passing upon the question whether the petition presents a justiciable controversy. Most certainly, where the petition alleges, as the Trustee's petition does, that the assessment made by the Arkansas Corporation Commission is in violation of the Constitution of Arkansas, and of the statute by which the Commission is created and by which its assessments must, of course, be governed, a justicable controversy is presented.

Petitioners concede that this assessment is subject to judicial review but insist that this review should be in the Arkansas courts. This insistence, as we have pointed out, is manifestly predicated upon the fact that if a review

thereof, by the Bankruptcy Court, is now denied, they will escape any judicial review of this assessment.

And we would again remark that an alleged over-assessment, based upon a valuation placed by the State Commission on an interstate railroad system operating in eight states, which is in excess of the true market or actual value of that system to the extent of more than one hundred million dollars, does not present a question solely of local state concern.

So far as concerns the allegation that the assessment of the Trustee's properties by the Arkansas Commission was in violation of the Fourteenth Amendment, petitioners urge that this averment is rendered untenable by the decision of this Court in Nashville, Chattanooga & St. Louis Railway v. Browning, 310 U. S. 362.

As we read the opinion in the Browning case, it does nothing of the sort. It appears from that opinion that there is nothing in the Constitution or statutes of Tennessee prohibiting the application of different yardsticks of value to different classes of property, and this Court points out that the petitioner in the Browning case (the railway company) makes no claim that its property is singled out from among other public service corporations for discrimination. The opinion in that case also refers (page 317) to the previous decision of this Court in *Great Northern Railway v. Weeks*, 297 U. S. 135, as standing alone in striking down "a nondiscriminatory assessment simply because it was thought excessive."

But in the present case, as has been pointed out, the Constitution of Arkansas specifically prohibits the application of different yardsticks of value for different classes of property. It prescribes true value for all alike, and the statute prescribes this same basis of value, with even

greater particularity, for railroad property and other property assessed by the Arkansas Corporation Commission. And in the absence of any constitutional or statutory warrant for such procedure, to assess the Trustee's properties at a figure vastly in excess of their true market value and thereby impose upon the Trustee an undue and disproportionate share of the tax burden, as compared with other property in the state, would certainly appear to constitute a violation of the Fourteenth Amendment. Such has been the holdings of this Court in numerous cases. Thus, in *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658, it was held, in a unanimous opinion, that (page 661):

> "Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of law must be extended to all,"

and also in

> *Road Improvement District No. 1 v. Missouri Pacific R. R. Co.*, 274 U. S. 188, at page 194,

wherein it was held that

> "Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and it is otherwise so excessive as to be a manifest arbitrary exaction and in violation of the due process of law clause of the same amendment."

However, wholly apart from the allegation of a violation of the Fourteenth Amendment, the averments in the Trustee's petition, as to the assessment being in violation of the statutes and of the Constitution of Arkansas, present a

justiciable controversy, calling for consideration and determination by the Bankruptcy Court under the provisions of Section 64a of the Bankruptcy Act.

The decree of the United States Circuit Court of Appeals, affirming the interlocutory order of the Bankruptcy Court, should be affirmed and that Court permitted to hear and determine the amount or legality of the disputed tax.

Respectfully submitted,

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APPENDIX.

Section 2048, Arkansas Statutes.

(Pope's Digest of Statutes of Arkansas for 1937.)

Section 2048. **Apportionment of Assessed Value.** The Commission shall assign or apportion the assessed value of the property of all persons, firms, companies, co-partnerships, associations and corporations, which it is required to assess, in the following manner:

There shall be deducted from the true market or actual value of the entire property, tangible and intangible, ascertained as in this Act provided, the true market or actual value, as ascertained from the information furnished by report, or otherwise, of all real and personal property of such company not used in its business as a public utility, and the remainder shall be treated as the true market or actual value of all its property, tangible and intangible, actually used or employed in its public utility business.

The Commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State, by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within this State bear to the total lines both within and without this State, or as its total receipts or income from operation within this State bear to its total receipts or income from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property,

When the value of the total utility operating property, tangible and intangible, in this State has been determined; or when the property and operations of such company is wholly within this State, there shall be assigned or apportioned to the several counties, towns, school districts and other taxing districts through or in which such company operates the value of all real estate and all tangible personal property which had a fixed situs therein on the first day of January of the current tax year; and the remaining part of the assessment, if any, shall be assigned or apportioned among the several taxing districts in proportion to the value of the tangible property assigned or apportioned thereto. Provided, that the value assigned to rolling stock of street, suburban or interurban railroad, railroad and bus line companies shall be apportioned among the several counties, towns and school districts through or in which such company operates in proportion to the mileage operated therein, and provided, further, that the value of the personal property of any express or sleeping car company shall be apportioned among the several counties, towns, and school districts through or in which such company operates in proportion to the mileage operated therein.

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